No. 598

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. F. HIGGINS, Master of the Respondent Steamer "Homer," Claimant, and J. S. GOLDSMITH and F. M. GRAHAM, Stipulators, *Appellants*,

vs.

CHARLES H. NEWMAN, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.
IN ADMIRALTY.

BRIEF OF APPELLANTS

METCALFE & JUREY,
SEATTLE, WASH.,
and ANDROS & FRANK,
SAN FRANCISCO, CAL.,
Proctors for Appellants.

LOWMAN & HANFORD S. & P. CO., SEATTLE.

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STATEMENT OF THE CASE.

The respondent vessel is a twin screw steam schooner, driven by two separate engines. She is equipped practically with two bridges, one in front of the pilot house and one higher up and just abaft the pilot house. The method and system of communication between the Master upon the bridge and the engineer in the engine-room is by means of a bell or gong upon or near each engine, with separate and distinct wires attached to each and running up to the bridges, with bell pulls

upon each bridge. In addition to the bells, there are speaking or return tubes connecting each engine with the bridge in front of the pilot house. These speaking tubes, in connection with the ventilator a few feet back of the bridge abaft the pilot house, serve for speaking communication between the bridge abaft the pilot house and the engine-room. This was the method and system of communication between the bridge and the engine-room on the respondent vessel at the time of the collision hereinafter mentioned, and, with the exception that the bell wires had been a few days before, by direction of the United States Inspector at Seattle, extended up and back to the bridge abaft the pilot house, with pulls there provided, was the system and method of communication between the bridge and the engine-room of the respondent vessel for many years past, and the same are now and have been for years in common and general use upon vessels of her class.

On the morning of April 26th, 1899, the respondent vessel steamed out from Moran's wharf in the harbor of Seattle, with her port engine going under slow bells and her starboard engine stationery, and thus crossed the harbor in a Northerly direction to Schwabacher's wharf, where she intended to land at the end of the wharf by approaching the same from the South and running along the end thereof.

The Brigantine "Blakely" was moored to the South side of Schwabacher's wharf and in some distance from the end of the wharf towards the shore.

When the respondent vessel came somewhat in line with the end of the wharf at which it was to make a landing, and upon nearing it, the Master gave the proper signals through the bell signal apparatus to back both engines full speed so as to stop his ship and get control of her before reaching the wharf. A latent defect in the bell signal apparatus prevented certain of the signals given from being sounded in the engine-room, the result of which was, the port engine was kept going forward and the starboard engine put to backing full speed. The effect of this counter-action of the engines was, that the vessal was suddenly and sharply swerved from her course to starboard, and headed towards the wharf and the Brigantine "Blakely" moored against the South side of the wharf. The swerving force to starboard of this counter-action of the engines was so sudden and violent that, before it could be detected and stopped or overcome, the ship had swung too far to starboard to be then turned to port and avoid a collision with the wharf and the "Blakely." The Master, then with both engines backing full speed, ordered the wheel "hard aport," hoping and believing he could avoid a collision with the wharf and the "Blakely" by swinging the vessel still farther to starboard, but struck the "Blakely" a glancing blow forward the fore-rigging and slightly damaged her.

The Libellant, at the time of the collision, was on board the "Blakely" repairing her main hatch, and claims to have been injured from being struck in the back by something torn loose and hurled to the deck

of the "Blakeley" by the force of the collision. The Libellant testifies that he was struck in the back by "something" as he was running from the scene of the collision. Neither the Libellant nor anyone else saw anything strike him, and it is simply the surmise of Libellant and his witnesses that he was struck by the "block" which was disloged in the collision and came down. The testimony and Libellant's admission clearly establish the fact that Libellant had due warning of the collision and appreciated that it was inevitable, and the dangers of it, and instead of fleeing from the position of peril he found himself in, as two other men similarly situated did and who escaped uninjured, he tarried in a dangerous position and even moved nearer to the impact of the collision, as it was imminent and occuring, and thus voluntarily, deliberately and recklessly exposed himself to a greater danger for the purpose of recovering his coat, in the pocket of which was a bank check for $234.00, which he says he did not want to lose. After recovering the coat and check, he ran, and testifies that he was struck in the back while running, and only a few feet from where he had been working.

The Libellant proceeded in rem against the respondent vessel upon the ground that the collision, in which the Libellant claims to have been injured, resulted from careless, negligent and unskillful navigation of the ship.

The vessel was arrested by the Marshal, but subsequently duly released to the Master, J. F. Higgins, as

claimant, upon claim made and stipulation to the Marshall in the sum of $12,000, with J. S. Goldsmith and F. M. Graham as sureties.

The Claimant answered (Record 37) denying the material allegations of the Libel and setting up affimatively that the collision was the result of an inevitable accident, and also (Amendment to Amended Answer, Record 414) that any injury which the Libellant may have received was the result of his own subsequent, voluntary and deliberate acts, recklessly exposing himself to the dangers of the collision.

The final decree was, in the first instance, against the Claimant for $12,000; and after an appeal from this decree had been perfected by the Claimant, a further or supplemental decree was entered against J. S. Goldsmith and F. M. Graham, stipulators on Claimant's bond for the release of the respondent vessel. This later or supplemental decree was entered over the objection of Claimant and his Stipulators, upon the ground that all further proceedings in the District Court were stayed by the Claimant's appeal. After entry of the decree against the Stipulators, the Claimant and Stipulators served and filed a new notice of appeal, assignment of errors and bond. Thus the whole case is brought up for consideration.

The questions involved are:

(I) That the collision was an inevitable accident, and the loss must rest where it falls.

(II) That Libellant's own subsequent, voluntary

and deliberate acts, recklessly exposing himself to the dangers of the collision for the purpose of recovering property belonging to him, was the primary cause of the injury complained of and that the Libellant assumed the risk he took, with all its consequences.

(III) That the evidence does not establish that the collision was the proximate cause of the injury complained of.

(IV) That permanent disability is not established to a reasonable certainty.

(V) That the damages awarded are grossly excessive; that the evidence does not support the awarding to Libellant of any damages at all; and that all proceedings in the District Court were stayed by the rules of that Court and by an appeal at the time the Supplemental Decree of February 19th was made and entered against the Stipulators.

SPECIFICATION OF ERRORS.

The Final Decree of February 5th, 1900, against the Claimant, and decision upon which the same is based, and the supplemental Decree of February 19th, 1900, against J. S. Goldsmith and F. M. Graham, Stipulators, are erroneous in the following particulars, to-wit:

I.

INEVITABLE ACCIDENT.

(1) In finding and holding that the collision between the repondent vessel and the Brigantine "Blakeley," in which it is alleged the Libellant received the injuries complained of, proximately resulted from negligent, careless and wrongful acts on the part of the Master of the respondent vessel, and faults on the part of the said Master, "First, in signaling the engineer to back the starboard engine without first actually knowing that his intended orders to back and reverse the port engine had been executed by the engineer. Second, in not giving attention to the helm, which is the means provided for controlling the course of a vessel under way, and neither one of these errors can be excused by reason of an unknown injury to the pintle."

(2) In failing and refusing to find and hold that the said collision directly and approximately resulted from a latent defect in the bell signal apparatus of the respondent vessel, which was not and could not have been discovered or avoided by the owners of the respondent vessel or the Master or crew in the exercise of reasonable

care, prudence and skill; and in failing and refrusing to hold that the said collision was an inevitable accident, over which neither the owners nor the Master or crew of the respondent vessel had any control or were in any manner responsible or liable therefor.

II.

LIBELLANT'S SUBSEQUENT ACTS PROXIMATE CAUSE OF THE INJURY.

(1) In finding and holding that the Libellant was and is free from fault.

(2) In failing and refusing to find and hold that the Libellant's subsequent, independent, voluntary and deliberate acts of negligence and recklessly exposing himself to the dangers of the collision, after due warning and appreciation of the dangers to which he was exposed, for the purpose of recovering property of trifling value to himself, were the sole and proximate cause of the injury complained of; and in failing and refusing to hold that, by such acts of Libellant, he assumed the risk he took, with all of its consequences, and cannot recover.

III.

COLLISION NOT THE PROXIMATE CAUSE OF THE INJURY.

In finding and holding that the injuries complained of proximately resulted from the Libellant being struck in the back by a 12-inch block torn from the fore yard arm of the Brigantine "Blakeley" and violently hurled by the force and violence of said collision.

IV.

EXTENT AND PERMANENCY OF LIBELLANT'S INJURIES.

In finding and holding that Libellant sustained great and permanent injuries—permanent disability—and awarding damages on that basis.

V.

MISCELLANEOUS.

(1) In finding and holding for the Libellant.

(2) In finding and holding that the Libellant is entitled to substantial damages or to any damages at all.

(3) In finding and holding in favor of the Libellant and against the Claimant and his Stipulators in the sum of $12,000, the same being grossly excessive; and in finding and holding against the Claimant and his Stipulators in any sum whatever.

(4) In not dismissing the Libel and awarding the Claimant costs herein.

(5) In finding and holding in the Supplemental Decree of February 19th, 1900, that no good and sufficient cause was shown to the Court why the Stipulators upon Claimant's Delivery Bond, J. S. Goldsmith and F. M. Graham, should not have performed the terms and conditions of their Stipulation and have paid the judgment entered herein February 5th, 1900.

(6) In failing and refusing to find and hold that, at the time the Supplemental Decree of February 19th was made and entered, the Final Decree herein of February 5th was stayed by an appeal, and that such was a good and sufficient cause for the failure of the said Stipulators to perform the terms and conditions of their Stipulation.

BRIEF OF THE ARGUMENT.

I.

INEVITABLE ACCIDENT.

(1) The vessel was lying at Moran's wharf in the Southerly part of the Harbor of Seattle, and the purpose of the Master was to steam across the Harbor in a Northerly direction to Schwabacher's wharf, make a landing, finish freighting his ship, and put to sea.

Record: Higgins 274-5.

(2) Accordingly the vessel proceeded slowly and carefully across the Harbor—pursuing a lawful purpose in a lawful manner.

Record: Higgins 275, 298; McCarty 309-10, 312-14; Fritch 345-6.

(3) It was not the purpose of the Master to go in on the South side of Schwabacher's wharf or anywhere near the Brigantine "Blakeley" moored close up against the South side of the wharf and in some distance towards the shore, but to land at the end of the wharf by approaching it from the South and running along the end to the landing place.

Record: Higgins 276.

(4) When the vessel came somewhat in line with the end of the wharf, where it was intended to land, the Master noticed the bowsprit of the "Hatton Hall, on the North side of the wharf projecting well out beyond the end of the wharf, and which he would strike if his ves-

sel went too far in making the landing. *This bowsprit projecting out from the North side of the wharf was the only obstruction in the course the vessel was pursuing and intended to pursue to make the landing, and was the only thing from which any danger could be apprehended, and the only thing the Master could be reasonably required to look out for and avoid;* the "Blakeley" was stationary and at a safe distance to starboard and entirely out of the course the vessel was pursuing and intended to pursue, and the Master could not be reasonably required to consider that vessel at all; and so with the wharf—the course the vessel was pursuing and intended to pursue was along the end of the wharf and no change of course or check in speed was necessary to avoid a collision with the wharf. Under these circumstances, all the Master had to do to berth his vessel, was to check her speed so as to stop at the end of the wharf before coming in contact with the bowsprit projecting across his course from the North side of the wharf. The signals and commands given by the Master to accomplish this purpose was proper, were timely given and would have been effectual had not a latent defect in the bell signal apparatus prevented the sounding of certain of his signals in the engine-room, thereby producing from the engines an effect entirely different from what the signals given called for, and before it was possible to detect the failure and counteract or overcome it, the vessel was suddenly and sharply and unalterably swerved from her course to the one she pursued to the collision with the "Blakeley," on the South side of the wharf.

Record: Higgins 276, 293, 304.

(5) After getting nearer in line with the end of the wharf, where it was intended to land, and seeing the bowsprit projecting out from the North side of the wharf directly across his course, *it was the purpose of the Master to stop his ship before reaching the landing place and get perfect control of her*, then move slowly to the landing and avoid the possibility of striking the bowsprit—the only obstruction in his course. *To accomplish this purpose*, when within easy distance and in ample time —the port engine then going forward under slow bells and the starboard engine stationary—the Master from the bridge abaft the pilot house, pulled the port engine bell cord once, to stop the port engine, then twice, to back the port engine full speed; then pulled the starboard engine bell cord twice, to back the starboard engine full speed. *All three signals to stop and back the port engine and to back the starboard engine were given as and constituted one compound signal, to effect one purpose—the stopping of the ship by backing both engines full speed—and were naturally given in as quick succession as possible.*

Record: Higgins 275-7, 296-7, 303-4, 372-4, 388-9; McCarty 308-10; Gilbertson 315-16; Bryant 229, 230, 242-3; Newhall 259-262.

(6) The signal given to back the starboard engine was sounded in the engine-room as given and that engine immediately commenced backing at full speed. Neither of the signals given to the port engine were sounded in the engine-room and that engine consequently continued its forward propulsion.

Record: McCarty 308-11.

(7) In giving these bell signals—*not any particular one*, but all of them—the Master detected or rather suspected that there was something wrong, he detected something unnatural in the working of the bell pulls, and there did not appear to be a proper resound. He heard signals sounded in the engine-room, but not all that he thought he should have heard, and *he thought he noticed* a slight swinging of the ship to starboard, which he knew should not have occurred, had all of his signals been sounded in the engine-room and acted upon. Yet he could not at the instant detect that *any particular signal* had not been sounded. The signals thus given were proper and necessary to accomplish the desired purpose, and the only signals that could effect such purpose, and fearing and suspecting that some of them may not have been sounded or been acted upon, and without waiting to ascertain what the trouble was, he immediately stepped to the ventilator, a few steps in the rear, *the next best and most effective means of communicating with the engine-room*, and repeated the whole compound signal by hollowing down the ventilator to the engineer to back both engines. The starboard engine was then backed full speed, and the port engine was immediately reversed and backed in like manner, and both so continued until after the collision.

Record: Higgins 277-8, 280, 289-295, 373-6, 386-391, 397-9; McCarty 308-10, 313-14; Bryant 229, 230.

(8) Although the time intervening between the giving of these bell signals and their repetition by the command given through the ventilator to back both engines

was *scarcely long enough to be estimated*, yet the sudden and violent swerving force to starboard, caused by the port engine going forward and the starboard engine backing full speed, was such that the vessel was, in that short time, swung so far from her course to starboard and in towards the wharf and the "Blakeley," lying close against the south side of the wharf and well in towards the shore, that it was impossible to change her course to port and avoid a collision with the wharf or Brigantine. The Master then, *as the only thing that could be done*, ordered the wheel "hard aport," *hoping and believing* he could swing the vessel far enough to starboard to avoid both the wharf and the Brigantine and make the open water beyond. The vessel proceeded thus—both engines backing full speed and wheel "hard aport"—and so *nearly* accomplished the purpose of the Master that the Brigantine was struck only a glancing blow forward the fore-rigging and slightly damaged.

Record: Higgins 278-280, 290-4, 298-9, 372-5, 388-394, 398-9; McCarty 313-14; Gilbertson 315-17; Newhall 262-4.

(9) The three bell signals, given to effect the stopping of the ship before reaching the wharf by backing both engines full speed, were the proper signals to be given under the circumstances, and were timely and properly given, and were all that skillful seamanship required. This is fully established by the evidence, and there is no evidence to the contrary.

Record: Bryant 231-2, 242-3; Higgins 277-8, 292-3, 303-5, 372-4, 390-1; Newhall 248-262.

(10) It is fully established by the evidence that all these bell signals were given in ample time and at proper distance from the wharf to stop the vessel before reaching the wharf, had all the signals as given been sounded in the engine-room. The substance of Capt. Bryant's testimony is, that the Master was at fault in not giving the bell signals in time and sufficient distance from the wharf. He bases this conclusion upon the idea that the ship is of light power, and testifies that if she had been of heavy power, the signals were properly given. It is shown by the evidence that the vessel was of heavy power, and that the signals were given in ample time to stop the ship before reaching the wharf. *The Honorable District Judge finds no fault with the Master in this particular.*

Record: Bryant 231-3, 236-7, 242-3; Fritch 356-7; Spiers 427; Jessen 429, 430; Higgins 303-5, 372-4, 390-1.

(11) The bell-signal-method or manner of communication between the bridge and the engine-room in the navigation of steamships is, and has been from the time of their construction, *the universal method and system in use; all other methods and means are mere substitutes.* Masters rely upon this method and means of communicating their commands in the navigation of their ships. *All the maritime law requires of them, in using this means of communication, is the exercise of reasonable care, prudence and skill in testing the condition and effectiveness of the apparatus, and in resorting to it in time to effect the desired purpose; and, upon its failure, to re-*

sort with all reasonable diligence to the next best method or means for accomplishing the desired purpose.

(12) The command given through the ventilator to back the engines was actually given and acted upon in ample time to have stopped the vessel before reaching the landing intended to be made, had not the counteraction of the engines, caused by the failure of the bell signals, swerved the vessel from her course so that the course the vessel was pursuing at the time the bell signals were given, and which it was intended she should pursue, could not be followed. This not only establishes due diligence on the part of the Master, in resorting to the next best means of communication, after the failure of his bell signals, but also that the bell signals were given in ample time and distance from the wharf. It also evinces the skillful seamanship required to meet the difficulty which suddenly arose.

Record: Higgins 278, 290, 294, 305, 375-6, 388-391, 397-9; McCarty 308-10; Newhall 261-3; Bryant 229, 230, 242-3.

(13) The Honorable District Judge made his first and, we think, vital error in treating these bell signals, to stop the port engine and back both engines, as *independent signals, each having an independent purpose which the Master was required to see was accomplished before proceeding with the others;* and bases upon this error the first fault he finds the Master guilty of, namely, "in signalling the engineer to back the starboard engine without first actually knowing that his intended orders to back and reverse the port engine had been

executed by the engineer." (Opinion—Record p. 440). He overlooks the fact that the signals were given to effect *one purpose—the stopping of the vessel by backing both engines—and were given as one compound signal for that purpose and were necessarily and properly given in as quick succession as possible.* Besides, there is *not a particle of evidence* that they were not the proper signals, or that they were improperly given. On the other hand, the testimony of the Master and even of Libellant's expert witnesses is, that the bell signals were proper and were properly given.

See Sub. Divs. 5, 9, 10 Ante 22 post of this Division of the Argument.

(14) The finding of the Honorable District Judge (Opinion—Record p. 434), that the Master deliberately signaled the starboard engine to back, after noticing in his own mind that his signal to reverse the port engine had not been sounded in the engine-room, is wholly contrary to the testimony of the Master (and it is all the testimony there is on this point).

See Sub. Divs. 4 and 5 Ante of this Division of the Argument.

(15) The error of the Honorable District Judge commenced in finding as a fact that the Master, after pulling the handle once to stop the port engine, "for the first time noticed the bowsprit of the "Hatton Hall" projecting beyond the end of the dock, and the discovery seems to have attracted his attention so that he probably did not notice the gong did not sound in reponse to his pull." (Opinion—Record p. 434.) There

is no evidence for this finding. The testimony of the Master, which is uncontroverted, is, that when the ship was about 50 feet East and 200 feet South of Schwabacher's wharf, he first noticed the bowsprit of the "Hatton Hall" projecting from the North side of the wharf, and then, *after seeing the bowsprit and because it was in the position he saw it, and to avoid a possible collision with it*, he gave all three of the bell signals. There is no warrant in the evidence whatever for finding that the bowsprit distracted the Master's attention and prevented his noticing whether or not there was a resound from the pull to stop the port engine.

Record: Higgins 276.

(16) The Honorable District Judge again errs in a material particular when he finds that the port engine was not reversed until the Master hollowed down the ventilator the second and last time. (Opinion Record p. 435.) The testimony of the Master and Engineer is that the port engine was reversed the first time the Master hollowed down the ventilator, and both engines thereafter continued to back full speed until after the collision.

Record: Higgins 278; McCarty 308-10.

(17) The Honorable District Judge again errs in finding that the bent printle could have been discovered "by a person of competent skill and judgment, if he acted with a degree of care and vigilence amounting to ordinary care and prudence in view of all the circumstances." (Opinion—Record p. 439.) There is no evidence to support this finding, and it is contrary to the

evidence. The testimony of the Master and engineer is, that *the bells were properly, thoroughly and practically tested* at Moran's wharf upon the vessel starting out *only half hour before the collision occurred*, and that they worked properly, responded promptly and accurately, and were apparently in perfect order and condition. We submit that they did all that was required of the Master and engineer by the maritime law, to test the condition and effectiveness of the apparatus to entitle its use and reliance upon it. The reasoning of the Court (Opinion—Supra), that the Master should have detected the trouble from the action or nonaction of the bell wire in his grasp, is mere speculation and is not justified by the evidence. The testimony of the Master is, that the bell wires used were new and worked hard—the bell pulls are shown by the evidence to be worked by upward movement and, upon being released, naturally fall to their original position—in pulling the handles, knowing there is a recoil, the hand would naturally, in anticipation of the same, recede to the original position and might or might not feel the effect of the recoil. Besides, *there is not a particle of evidence that the printle actually hung and prevented a recoil except the last time it was used.* For all the evidence discloses upon this point, the printle may have worked the full length every pull, but sufficiently hard, on account of its bent condition, to prevent the sounding of the gong, and this was probably the case, as the *Master testifies that the bell pulls went back each time.* Under any of these conditions the Master might not, though exercising reasonable care, prudence and skill, have detected

the situation of affairs. He is shown to have been for may years a tried and experienced ship master, and testifies that, while he detected something unusual in the bell pulls yet he could not locate the trouble and attributed it somewhat to the newness of the bell pulls used, and *did not*, *in fact*, *detect any absence of the recoil.*

Record: Higgins 280-1, 294, 336-7, 379-382, 387-9, 397-8; McCarty 308-13.

(18) Another error made by the Honorable District Judge, and upon which he bases the second fault he charges the Master with, namely, "in not giving attention to the helm, which is the means provided for controlling the course of a ship under way." (Opinion—Record p. 440). This is mere *speculation* and is not justified by the evidence. *There is not a particle of evidence that the Master could have used the helm for the purpose stated.* Libellant's expert witnesses, the Local Inspector of Hulls and Boilers, Capt. Bryant, and Capt. Newhall, a Master Mariner, and who showed no hesitation in criticising the Master where they thought he was at fault, do not even suggest, much less testify, that the Master could have overcome the counter-action of the engines, under the conditions that existed, by the use of the helm. *On the other hand*, *the testimony of the Master is*, *that the swerving of the ship to starboard was so sudden*, *violent and unexpected that there was no time to use the helm*, *to throw the ship to starboard*, *after detecting the necessity for such use*, *and that it could not be used for that purpose* or for any other purpose than to port the wheel and attempt to swing the ship farther

to starboard to avoid a collision, if possible, with the wharf and the Brigantine, and this the evidence shows the Master promptly did—showing that he was well aware of the presence of the helm and its utility in navigation.

Record: Higgins 278, 290, 298, 304, 398-9; Gilbertson 315-16.

(19) The testimony of the Master is, that, when he hollowed down the ventilator the first time, it was *more a precaution against what he feared or suspected to be wrong than to correct what he knew to be wrong.* There is no evidence that there was any apparent necessity for the use of the helm. A little swerving of the ship to starboard (and the swerving must have been slight at first) did not imperatively require the use of the helm, for the ship was then about 200 feet from the wharf and about 50 feet out of line with the end of the wharf, along which the landing was to be made, and the *Master was wholly unaware of the violent swerving force at work.* Besides, the Master says, before hollowing down the ventilator, *he did not know that the ship was swerving to starboard, but thought he noticed such a swerving.* His first duty was to correct what he believed was wrong. This he did, and, after that, it was too late to use the helm other than as he did; at any rate, the worst that could be made of his failure to use the helm to overcome the counter-action of the engines would be "*error in extremis*," for which he should not be held in fault.

Record: Higgins 290-1, 298.

Spencer on Marine Collisions, Sec. 196.

The Clytie, *Fed. Case No. 2913*.
The Maurice B. Grover, *92 Fed. 678*.

(20) *The primary and sole cause of the failure of the bell signals*, given to stop and back the port engine, to sound in the engine-room, *was a latent defect in the bell signal apparatus*. The "printle," a tube passing through and attached to the deck and extending about six inches above, through which the bell-wire passes, to prevent leakage where the bell-wire passes through the deck, had become bent, so that the "cover," a larger tube attached to the bell-wire working over the "printle," upon the bell-wire being pulled to signal the port engine to stop, or was so obstructed that the gong in the engine-room was prevented from sounding; and upon the second pull of that bell wire, to signal the port engine to back, the "cover" hung on the "printle" and again prevented the gong in the engine-room from sounding, and after the collision this "cover" was found hung in this manner.

Record: Higgins 279, 283-7, 290, 295-6, 299-302, 337-8, 340-2.

(21) *This latent defect* in the bell signal apparatus was the primary cause of the condition of the port engine going forward while the starboard engine was backing full speed, which resulted naturally and inevitably in the vessel being swerved suddenly to starboard and on the course from which she could not be turned, and which she pursued to the collision with the "Blakeley." This latent defect was thus the primary and proximate cause of the collision—*it set in motion a powerful*

and dangerous force, which rendered the vessel unmanagable and drove it on to the collision.

See Authentic Sub. Divs. 32, 33, 34, 38 and 39 post of this Division of the Argument.

(22) All the signals and commands given by the Master from leaving Moran's wharf until after the collision were each and all the proper signals and commands to be given under the circumstances and all that skillful seamanship required. This is even the testimony of Libellant's experts.

Record: Bryant 230-4, 237-8; Newhall 259-265.

(23) The ship was properly equipped (particularly as to means of communication between bridge and engine-room) in the manner usual and customary with vessels of her class.

Record: Higgins 280-3, 286-8, 330-2, 336-9, 340-2, 375-380; McCarty 306-8; Fritch 343-8; Dehm 403-4; Bryant 225-7; Newhall 247-9; Spiers 425-7; Jessen 428-430.

(24) The bell-wires were, a few days prior to the accident, by direction of the United States Inspectors at Seattle, extended back to the bridge aft the pilot house, that the Master might stand there in a more advantageous position in navigating his ship.

Record: Higgins 281; McCarty 312-13; Fritch 343-5; Dehm 403-4; Bryant 227-8.

(25) The ship had been regularly inspected and approved by the United States Inspectors, the last time at Seattle about six days prior to the collision.

Record: Higgins 282, 294; Fritch 344-5; Bryant 225-7.

See the "Virgo"—post

(26) The Master and engineer were competent, experienced and skillful officers and were in their proper places.

Record: Higgins 274, 289, 290; McCarty 305-6; Gilbertson 314-16; Fritch 345-9.

(27) The position occupied by the Master—the bridge aft the pilot house—was where the United States Inspector at Seattle, only a few days before, had provided for him to stand in navigating his ship, and the position was a proper one and from which the Master could see and hear and communicate with the engineer in the engine-room, both by bell and sound, better than from the bridge in front of the pilot house.

Record: Higgins 289, 290, 330-2, 336-8, 340-1, 373-6, 386-7; Gilbertson 315-16; Dehm 404; Bryant 218, 228-9; Newhall 248, 267.

(28) The use of the port engine alone was proper under the circumstances.

Record: Higgins 275, 372-3, 382-5, 395-7.

(29) The criticism of the use of the port engine alone was solely that they would have used the other engine.

Record: Newhall 268-273.

(30) The testimony of Capt. Bryant shows there may be just a little feeling on the part of the witness against the ship. The statement that the Master and

engineer were green men was wholly gratuitous and is shown by the testimony in the case to be untrue. The statement that the Master had no business to get his ship in where he did is of like character and, in addition, frivolous, and simply shows a desire to criticise.

Record: Bryant 225, 231-4, Higgins 274, McCarty 305-6, Fritch 345-9.

(31) The collision thus resulted from an inevitable and unavoidable accident, and if Libellant received any injury resulting therefrom, neither the vessel nor her owner is liable therefor, and "the loss must rest where it falls."

(32) "Inevitable accident is, where a vessel, in pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view, the safety of life and property."

Henry's Adm. Jur. and Pro. (*1 Ed.*) *Sec. 85.*
The "Europa" 2 Eng. L. and Eq. R. 557 (*560*).
The Austria, 14 Fed. 298.
Desty—Shipping and Admiralty (*1 Ed.*) *Sec. 384.*
The Grace Girdler, 7 Wall. 196.
The Morning Star, 2 Wall. 550.
The Union S. S. Co. vs. The New York and U. S. S. Co., 24 How. 307.
The Lady Pike, 2 Biss. 141.
Spencer on Marine Collisions, Sec. 195.

(33) "The term "inevitable accident" is not therefore to be confounded with *vis major*. In the absence of proof of ordinary proper care and caution, an accident comes into the former category, although, if every possible contingency had been foreseen, it might have been guarded against." It may occur in the entire absence of *vis major* and the like.

Henry's Adm. Jur. and Pro. (*1 Ed.*) *Sec. 85.*
Desty—Shipping and Admiralty (*1 Ed.*) *Sec. 384.*
The Java, *14 Wall. 189.*

(34) To establish the defense of inevitable accident, it is not necessary to show measures of precaution, "Which, perhaps, an over-prudent man would take" to guard against possible danger, but "It is required to use such precautions as are usual to prevent danger" only.

Henry's Adm. Jur. and Pro. (*1 Ed.*) *Sec. 85.*
The "William Lindsay" 5 L. R. P. C. 338; 2 M. L. Cas. N. S. 118.
Desty—Shipping and Admiralty (*1 Ed.*) *Sec. 384.*
The Java, *14 Wall. 189.*
The Brooklyn, *Fed. Case No. 1939; 4 Blatch. 365.*
The France, *59 Fed. 479.*
The Ohio, *91 Fed. 547.*

(35) "In the exercise of care and diligence no unreasonable duty is required. The law makes no unreasonable demands; it does not require from any man superhuman wisdom or foresight. Therefore, no one is guilty of negligence by reason of failing to take pre-

cautions which no other man would be likely to take under the same circumstances. If one uses every precaution which the most prudent man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable, even though, if he had used them, the injury would certainly have been avoided. If he uses all the skill and diligence which can be attained by reasonable means, he is not responsible for failure."

1 Shear. & Red. on Neg. Sec. 11.

(36) In the case of the "Europa" (2 Eng. L. & Eq. R. 557, *560*), which grew out of a collision, Dr. Lushington, instructing the Trinity Masters, said:

"There is another distinction taken which is applicable to this case: 'But it should be observed, that the caution which the law requires is not the utmost precaution that can be used.' The law is not so extravagant as to require that a man should possess that mind, and firmness of purpose, as always to do what is right to the very letter. If it were so, it is obvious that the demands of the law would be seldom satisfied. It is sufficient that a reasonable precaution be taken, such as is usual and ordinary in similar cases, such as has been found, by long experience, in the ordinary course of things, to answer the end, the end being the safety of life and property."

(37) In the Nitro Glycerine case (15 Wall. 524) the Court held, that "the reasonable care which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own in-

terests were to be affected, and the whole risk were his own."

(38) "Where the vessel is constructed and equipped in the mode usual and customary with other vessels of like character and in a mode approved by competent judges and previous experience, then, in case of an accident happening by reason of a latent defect in the equipment and construction, there is no negligence on the part of the owner." (Sylabus).

The Lizzie Frank, 31 Fed. 477.
The Flower Gate, 31 Fed. 762.
Spencer on Marine Collisions, Sec. 179.

(39) *An accident, caused by a latent defect in the machinery or apparatus for navigation of a vessel, and which was not and could not be discovered by execising reasonable care and caution, is an inevitable accident.*

The "William Lindsay," Supra.
The "Virgo" 35 L. T. N. S. 519: 3 M. L. Cas. 285.
The Olympia, 52 Fed. 985; 61 Fed. 120.
The Lizzie Frank, 31 Fed. 477.
The Flower Gate, 31 Fed. 762.
The Rheola, 7 Fed. 781.
The Riverdale, 53 Fed. 286.
The Transfer No. 3, 91 Fed. 803.
The M. R. Brazos, Fed. Case No. 9898; 10 Ben. 435.

II.

LIBELLANT'S SUBSEQUENT ACTS PROXIMATE CAUSE OF THE INJURY.

(1) The *proximate cause* of whatever injury the Libellant received was *his own subsequent, voluntary and deliberate acts, recklessly exposing himself* to the dangers of the collision for the purpose of recovering property of trifling value belonging to him, and he must be held to have *aussumed the risk of the same.*

(2) Libellant's very first witness testifies that, at the first jar of the collision, he came on deck and saw Libellant running in the direction of the collision, to catch his coat or some tools.

Record: Swan 77-80.

(3) Another witness for Libellant, who was standing by and talking to him at the time of the collision, testifies that he saw the "Homer" coming and that, as he jumped past Libellant, he hollered to him to "look out," and as he jumped by Libellant, saw him "stop and start" in the direction he was going (away from the scene of the collision) and then "turn," and that, when he got to the galley door, he heard Libellant say he was hurt, and looked round and saw him falling against the main rigging only a few feet from where he had been standing.

Record: Waldron 90-9; Libellant 128-9.

(4) Libellant admits that, after receiving warning of the danger, he got his coat before running, because

it had a check in it for $234.00, which he did not want to lose.

Record: Libellant 121-2, 128-130, 141-2.

(5) Even though the Libellant only stopped to pick up his coat lying by the side of him, as he testifies, the thought and movement necessary to recover it consumed time enough, had it been spent in running, as he did after getting his coat, would certainly have placed him far beyond where he was when he says he was hit.

(6) Libellant is mistaken about his coat being right at his feet and that his flight was not retarded by recovering it. The two men with Libellant, Waldron and Anderson, were both nearer the scene of the collision than Libellant (Record: Waldron 97-9; Anderson 200-3), and both testify that they ran by Libellant (Record: Anderson 200-1), Waldron warning him to "look out," as he jumped by him, and testifies that he saw Libellant start in the direction he, Waldron, was running and then "turn." *Libellant admits that he saw the "Homer" coming and the man hollowing down the ventilator (which was certainly a considerable time before the collision), and appreciating there was great danger*, grabbed his coat and ran (Record; 121-2, 128-130, 141-2). The other two men testify, there first warning of the collision was just as the boats were about to strike (Record: Waldron 90, 95-7; Anderson 201-3). So, evidently, *the Libellant had due warning, as early or earlier than the other two men* (Record: 127-8), and that they all three started in the same direction and about the same

time (Record: Anderson 202-4); at any rate, that the Libellant started close on the heels of the other two men. *Then why did Waldron and Anderson get clear out of harm's way, while the Libellant was still within a few feet (Record: 128-9) of where Waldron testifies he saw him start in the direction he was running, and "turn?"* The Honorable District Judge thinks it was because the "Libellant was not so nimble in getting out of the way, when surprised by imminent danger, as the other persons who were near him at the time," and that he "failed to save himself by the extreme swiftness or extraordinary skill of his movements." The evidence does not support either proposition. There seems to us but one conclusion — *Liabellant's coat was farther away and towards the collision, and it took him longer to recover it than he seems to think it did.* This conclusion is established by the testimony of the Libellant and his own witnesses—he must have started to run with Waldron and Anderson and in the same direction, as Waldron testifies, and then "turned," as Waldron testifies, and then as Swan testifies, ran in the direction of the "Homer," to get his coat or tools. All this took time, and must have taken considerable time. *Libellant admits that, while he was facing towards the "Homer," after receiving warning from the man with him, this man got clear away and was out of sight when he turned from the "Homer" to run away. (Record: p. 127).* The Honorable District Judge seems to think he may have been delayed on this account one or two seconds. *Any delay in getting away from a collision, unless excusable is unreasonable and fatal to recover.*

(7) The testimony of Libellant is, that he was running away from the scene of danger at the time he was hit—*doing just the proper thing then—and had he done that at first*, as the other two men did and escaped uninjured, *instead of stopping and running back to recover his coat with a check in it, he would have been beyond all question far beyond the point at which he says he was at the time whatever hit him came down*, and would have escaped the injuries he received.

Record: Newman 121-2.

(8) Had the Libellant become frustrated by the iminent danger, and his delay in getting out of the way had been in any manner or measure attributed to that, a very different case would be presented, but there is no contention that such was the case. The reference in the decision to Libellant's being surprised by imminent danger and to error in *ex tremis* is wholly unsupported by evidence. The Libellant's own testimony shows coolness, thought and deliberation in the midst of the dangers surrounding him—he saw the "Homer" coming and the man hollowing down the ventilator, and knew there would be a collision, appreciated the danger of it, and started to flee from it; he then thought of the bank check for $234.00 in his coat pocket, and he did not want to lose it, and while other men, similarly situated as he, were running for their lives, after warning him, he coolly and deliberately stopped, turned and ran back towards the collision to get his coat and check, and when they were recovered, followed the other men, as he had started to do before.

(9) Again, had the Libellant thus delayed and exposed himself to the dangers of the collision for the purpose of saving human life or even recovering property of great value to him and likely to be destroyed and lost in the collision, a different case from the one at bar would be presented, as he might be excusable for the same; but this exposure to the dangers of the collision was for the sole and admitted purpose of recovering his coat and a bank check for $234.00, all of which, if lost, could have been replaced at a small expense.

Record: Newman 141-2.

(10) *The Libellant took the risk* of the delay and exposure, to recover his coat and check, deliberately and of his own accord and after it was certainly beyond the power of the respondent or any of her officers to prevent what was then happening and was about to happen, or in any manner to shield, protect or prevent him; and he *should be compelled to assume the risk he took* and, with it, all the consequences, whatever they may be.

(11) The criticism of the Honorable District Judge of the Master, for failure to give warning through the whistle (Opinion—Record p. 435), is not justified by the evidence. The testimony of the Master fully and satisfactorily explains why the whistle was not used. Besides, the Libellant admits that he received warning of the approach of the "Homer" before the collision took place—that he saw the Master hollowing down the ventilator and knew what was coming. We submit this was sufficient warning. The testimony shows the

Libellant did not heed the warning he received, but even tarried and even went nearer to the scene of the collision, while it was imminent and occurring. We submit there is no ground for assuming that the whistle would have been greater warning than Libellant admits he received, or that he would have heeded it any more.

Record: Higgins 371-2, 393-5, 399-402; Newman 121-2, 128-130, 141-2.

(12) It was the duty of Libellant, upon receiving warning of danger, to do all in his power to get away from it, and when he voluntarily and deliberately tarried in a position of danger and even went nearer to the scene of the collision, recklessly exposing himself to greater danger, while it was imminent and even occurring, for the purpose of recovering his coat and check, then he assumed the risk he took, and if it is shown that, but for such subsequent acts on his part, the injury would not have been received, then such acts are the proximate cause of the injury and he cannot recover, whether the collision was brought about by the negligence of respondent or not.

Buswell on Personal Injuries (2d Ed.) Sec. 143.
Frarer v. South & N. A. R. Co., 1 So. 85.
7 American & Eng. Enc. of Law (2nd Ed.) 386, 387, 392.
Deville v. S. P. R. R. Co., 50 Calf. 383.
Cook v. Johnson, 58 Mich. 437.
Lake Shore & M. S. R. R. Co. v. Bangs, 47 Mich. 470.
Harris v. Township, 8 Am. St. Rep. 842.

Pike v. Grand Trunk, etc., 39 Fed. 255.
Sherman & Red. on Negligence (5th Ed.), Sec. 85, 87, 101.
Desty on Shipping & Admiralty, Sec. 386.
The Lizzie Frank, 31 Fed. 477.
Irvin v. Spriggs, 6 Gill (Md.) 200, 46 Am Dec. 669.
Beach on Contributory Neg. Sec 24-34, 57.
Holmes v. Southern Pac. etc., 31 Pac. 834.
Spencer on Marine Collisions, Sec. 188.
Sullivan v. Dunham, 41 N. Y. Sup. 1083.
Morris v. Lake Shore, etc., 42 N. E. Rep. 579.
Eckert v. The Long Island, etc., 43 N. Y. 502.
Goldstine v. The Chicago, etc., 46 Wisc. 404.
Berg v. Great Northern, etc., 73 N. Y. Sup. 91.
Warton on Negligence (1st Ed.), Sec. 300.

(13) After finding that the Master was in fault in the navigation of his ship, the Honorable District Judge further erred in not finding that these acts of the Libellant were acts of negligence on his part and the proximate cause of the injuries he alleges to have received, and precluded his recovery.

Spencer on Marine Collisions, Sec. 187.
The Carl, etc., 18 Fed. 655.
The Explorer, 20 Fed. 135.
The Wanderer, 20 Fed. 141.
The E. B. Ward, Jr., 20 Fed. 702.
Sunny v. Holt, 15 Fed. 880.

(14) And again, after finding that the Master was in fault in the navigation of his ship and that these acts

of the Libellant were not such as to preclude his recovery for the injuries he alleges to have received, the Honorable District Judge still further erred in not holding that these acts of Libellant required at least a division of the damages which the evidence may establish the Libellant received.

Spencer on Marine Collisions, Sec. 191.
The Max Morris, 24 Fed. 860; 28 Fed. 881; 137 U. S. 1.
The Mystic, 44 Fed. 398.
Olson v. Flavel, 34 Fed. 477.

III.

COLLISION NOT THE PROXIMATE CAUSE OF THE INJURY.

(1) It is a mere supposition on the part of the Libellant and his witnesses that he was hit by the "block." Neither he nor any of his witnesses saw anything hit him, or know what hit him.

Record: Swan 77-80; Gray 81-2; 87-8; Waldron 92; Brown 101-2; Dodge 106-7; Roberts 114; Newman (Libellant) 121-3, 131-3; Anderson 200-1, 204-9.

(2) The evidence does not support the finding of the Honorable District Judge, that there is a preponderance of evidence that the "block" struck the Libellant and caused the injury. A number of witnesses testify that they saw the "block," or a "block," lying on the deck of the "Blakeley" near where the Libellant was hurt. "Blocks" are very common things about a ship, and the Honorable District Judge seems to think there was more than one lying around in this instance.

These witnesses are as liable as the man at the wheel of the "Homer" to get the blocks mixed. We submit this is far short of proof sufficient to establish that the "block" struck the Libellant, and far short of the proof he should be required to make, considering the relative situation of the parties, to entitle him to a judgment for "substantial damages." None of these witnesses even saw the "block" strike anywhere, much less strike the Libellant. On the other hand, the helmsman on the "Homer" testifies that he saw the "block" strike on the deck of the "Homer" and rest there. There is no ground for finding that he referred to some other "block," for the "block" in question is identified by him. This is positive and direct testimony that the "block" in question did not strike the Libellant (which is Libellant's theory of the injury), against a mere inference on the other hand that the "block" did strike the Libellant, from the fact that a block was found lying near him after he was injured.

Record: Gilbertson 317-327.

(3) The injury complained of, to whatever extent it may be, was received upon the deck of the "Blakeley," and necessarily the Master and crew and those on board at the time are the only witnesses to the accident. The Master and crew of the "Blakeley" are of course keenly interested in shielding the "Blakeley" from any fault or liability, and all of them are shown to be friendly to the Libellant and testify in his behalf whether they know anything or not. This gives the Libellant an immense advantage over the respondent. This inequal-

ity should require of Libellant positive proof that the primary cause of the injury was some force or violence negligently or carelessly put in motion by the respondent.

(4) That the proximate cause of the injury was any force or violence caused by the collision is a mere matter of speculation on the part of Libellant and his witnesses. The Libellant may have been hit by innumerable parts of the tackle of the "Blakeley" or materials for her repair, carelessly or negligently suspended or attached, lying at the wharf undergoing repairs as she was, and which any slight jar might have dislodged. Such a thing is not at all inconsistent with the testimony of the Libellant and his witnesses, save their conclusions from mere supposition.

IV.

EXTENT AND PERMANENCY OF LIBELLANT'S INJURIES.

(1) The Honorable District Judge erred in finding that Libellant was permanently disabled (Opinion—Record p. 436, 442), and awarding damages upon that basis. Such a finding and award is not supported by the evidence.

(2) The testimony of Libellants own surgeons upon the question of the extent and permanency of his injuries is as follows:

DR. MILLER—(Record: 169-170).

"Q. I will ask you to state whether or not they are likely to be permanent?

A. It is more than *probable* that they will be permanent, although there is a *possibility*—a *bare possibil-*

ity of his regaining more or less of the use of the limbs, but it is a question if he will ever be able to walk."

"Q. I will ask you if you can state the extent of the injury to his spinal column or the lower lumbar vertebra?

A. The clinical conditions which I observed *would indicate* that the branches that emerge from the lower portion of the spinal cord are crushed.

Q. That is, the nerves extending out from the lower end of the spinal cord?

A. Yes.

Q. In case that is the manner in which he is injured, is there any likelihood, even, of his ever having the use of his lower limbs?

Objected to * * *

A. It is *barely possible*, but not *probable*."

DR. WOTHERSPOON—(Record: 188).

"Q. I will ask you whether or not, in your opinion, he will ever be able to use the limbs so as to get around and follow his previous occupation of ship carpenter?

A. *He might recover. He may be able to use his limbs yet. That is a question that I could not answer very definitely.*

Q. Well, about what would be the chances?

A. *I could not even estimate the chances because I do not know the amount of injury to the nerves or spinal cord.*"

We submit this is not sufficient proof of permanent disability to justify awarding damages on that basis.

(3) Libellant's surgeons both testify that, up to the time of giving their testimony—from April 26th to

August 2nd—they had resorted only to simple remedies and methods to determine the extent and nature of and to treat Libellant's injuries—trusting more to nature than to scientific surgical treatment. *Neither of them had then determined what was the matter with the man or what treatment he required, and were simpply awaiting developments. The testimony of both of them shows conclusively that the time had not then arrived when the nature, extent or permanency of the Libellant's injuries could be determined with reasonable certainty. Their testimony as to the nature, extent and permanency of the Libellant's injuries, considered in connection with this fact, makes it but conjecture—mere guess-work.*

Record: Dr. Miller 168-182; Dr. Wotherspoon 182-198.

(4) Permanent disability *certainly cannot be established* with that reasonable certainty that the law requires to justify a recovery upon that basis, *until the nature and extent of the injuries have been ascertained and a fixed and permanent condition has been developed.* Until that stage has been reached (and the testimony of the surgeons shows conclusively that it has not in the case at bar), the result is merely conjectural, supported only in the imagination.

(5) To entitle a recovery for permanent disability, it must be established with reasonable certainty that the injuries will be permanent and that permanent disability will inevitable result. The possibility or probability or likelihood of permanent disability will not support a recovery upon that basis; nor will any degree

of possibility, probability or likelihood of permanent disability, based upon mere conjecture, suffice.

White v. Milwaukee City Ry. Co., 61 Wisc. 536.
Cleveland C. C. & I. Ry. Co. v. Newell, 3 N. E. 836 (843).
Ohio & M. Ry. Co. v. Crosby, 7 N. E. 373.
Frye v. The Dubuque & S. W. Ry. Co., 45 Ia. 416.
Curtis v. Rochester & S. R. R. Co., 18 N.Y. 534.
Toges v. New York Central & H. R. R. Co., 11 N. E. 369.
Allender v. C. R. I. & P. R. R. Co., 37 Ia. 264.
Groundwater v. Town of Washington, 65 N. W. 871.
Dawson v. City of Troy, 2 N. Y. Supp. 136.
Hardy v. Milwaukee, 61 N. W. 771.
Smith v. Milwaukee B. & T., etc., 64 N. W. 1041.
Strohm v. The New York L. E. & W. R. R. Co., 96 N. Y. 305.
Miley v. Broadway, etc., 8 N. Y. Supp. 455.
Louisville S. & R. Co. v. Minogue 14 S.W. 357.

(6) Claimant asked both the Proctors for Libellant and the Honorable District Judge for permission to make a surgical examination of the Libellant by reputable and skillfull surgeons of his own (Claimant's) selection, under such directions as the Court might see proper to make. The Libellant and his Proctors declined to permit such an examination, and the Honorable District Judge refused to make an order directing

it. We do not contend, in the face of the Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, that the Honorable District Judge erred in refusing to make the order, yet the scathing criticism of the rule laid down by the majority of the Court by Justices Brewer and Brown in their dissenting opinion makes it too plain that the evils which may result from the rule should be avoided in every legitimate manner. The application to the Court for this order was not made expecting it to be granted, but for the purpose of placing Libellant and Proctors squarely and indisputably upon record—in the face of the Court—as taking advantage of the technicalities of the law to prevent the X-Rays of justice being turned on their carefully concealed network of pretenses and make them demonstrate to the Court that their claims and demands were such as could be established only in the dark—claims and demands they would not jeopardize by a full, fair and honest investigation.

(7) While the rule laid down by the majority of the Court in the Union Pacific v. Botsford, supra, clearly precludes the Court from enforcing a surgical examination of the Libellant, yet it does not justify the Libellant in refusing to permit such an examination, when he is attempting to establish permanent disability for recovery upon that basis by the testimony of his own attending surgeons. Nor does it preclude the Court from withholding damages for permanent disability, unless the Libellant is willing to permit and does permit a full, fair and honest investigation. Nor does it pre-

clude the Court from protecting itself and the Claimant from imposition and fraud. The error committed by the Honorable District Judge in this particular was not in refusing the order, but in considering Libellant's claim for permanent disability and awarding him damages upon that basis after it was so clearly demonstrated to the Court that a full, fair and honest investigation upon this point had been deliberately and purposely precluded by the Libellant.

The record shows that *at one time Libellant* and his Proctors seems to have consented to a surgical examination by Claimant, and they will doubtless urge that fact to relieve themselves of the embarrassment they justly labor under, in having refused to permit such an examination. There is such a thing as consenting upon the record and refusing out of the record —consenting, yet imposing conditions which amount to a refusal. That such was the case is clearly shown by the record and the fact that Claimant was compelled to apply to the Court for an order directing the examination. If the Libellant and his Proctors were as willing to accord to the Claimant as fair and full an opportunity to make a surgical examination as they would have it appear, the Claimant would not have been driven to an application to the Court for relief, and Counsel for Libellant would not have felt called upon to *oppose the application by such an elaborate affidavit as he did* (Record: 408). The record shows that *Libellant was taking his testimony from April 29th (Record: 76) to August 21st Record: 243, 273) before he closed his case, and took tes-*

timony in chief as late as September 25th (Record: 362); yet, on September 23rd (Record: 53) they began to apply to the Court to compel the reporting of the case, and the shutting off of the Claimant. Their liberality and magnanimity is manifest not only by this record, but by the affidavit of Counsel, opposing Claimant's application for a surgical examination. A previous offer to permit a surgical examination, even though, made in good faith and unconditional, cannot justify Libellant's refusal, and particularly when the offer was made before the Claimant was prepared to take advantage of it and withdrawn as soon as he was prepared to avail himself of it. The affidavits of George Fritch (Record: 64) and J. B. Metcalfe (Record 57) clearly shows that Claimant was proceeding with all due diligence in presenting his case, and also show the necessity for the surgical examination on the part of Claimant, and that it was offered to be made and applied for as soon as its necessity could be determined, and it could be properly done.

(8) Libellant may have the technical right to refuse to submit to even such a surgical examination on the part of the Claimant, but when he does, he is estopped to say that his injuries are permanent, or other than temporary; otherwise, the door to fraud is wide open, and the Claimant is without his day in Court.

(9) If Libellant can avail himself of this privilege and then claim damages for permanent disability—if he can try his case upon such testimony as he sees fit to give to the Court and cut off all possibility of its being controverted or contradicted, then there is no reason

why permanent disability cannot be established in every case of injury.

(10) Libellant's surgeons may be reputable men and skillful in their profession, but they are *his doctors*, and they will certainly give him the benefit of every advantage and doubt and, if so disposed, and relieved from possibility of detection, can make his case whether he has one or not.

(11) Notwithstanding the testimony of Libellant's surgeons, that they could not then say what the nature or extent of the Libellant's injuries were, or what was the proper treatment to give him, and that they were awaiting developments and a change to take place, *the Libellant saw fit to go to trial upon this testomony more than six months after it was given.* Had there been no improvement in Libellant's condition, or if there had been a change for the worse, since the taking of the testimony, naturally the Libellant would have sought the benefit of that fact upon the trial. Therefore, his silence and seclusion should be conclusive evidence that there *has been a change*, which he desires to and which he has kept from the Court.

(12) The testimony of Dr. Wotherspoon and of the Nurse was, that *there had been an improvement* in the Libellant at the time they testified. This, taken in connection with the fact that the surgeons were by no means sure what the result would be and were *awaiting developments and expecting a change*, does not make it an unreasonable assumption that, while the Honorable District Judge was finding permanent disability and award-

ing damages therefore in the sum of $12,000, the Libellant was making rapid strides along the highway to permanent recovery, if not then fully recovered.

Record: Dr. Wotherspoon 187; Thompson 150.

(13) The testimony of Libellant's surgeons shows that he is not receiving sufficient, if he is receiving proper surgical attention. Dr. Miller, his attending surgeon, testifies that he saw him daily from May 1st to May 15th, and after that and his removal to his West Seattle home, and up to August 2nd, the date of the giving of his testimony, he had only seen him "four or five or six times." Dr. Wotherspoon testified that he has only made three examinations, to ascertain, if possible, the nature and extent of Libellant's injuries. We submit that, from Dr. Miller's own testimony, the patient is either not receiving sufficient surgical attention, or his injuries are not so severe and serious as he would have it understood they are. Libellant has no right to neglect his injuries, conceal them from the Claimant, and then charge him with what he, Libellant, says is their result.

Record: Dr. Miller 169-170; Dr. Wotherspoon 182, 186.

City of Goshen v. England, 21 N. E. 977.
Allender v. C. R. I. & P. R. R. Co., 37 Ia. 264.
Citizens St. Ry. Co. v. Hobbs, 43 N. E. 479.
City of Waxahatchie v. Connor, 35 S. W. 692.

(14) We submit that, upon Libellant's own case, his suit was prematurely brought, if he would recover

for permanent disability. That the award of $12,000 was made upon that basis cannot be questioned.

V.

MISCELLANEOUS.

(1) Subdivisions 1, 2, 3 and 4 of Specification of Errors, V, are fully covered in the Argument upon the preceding Specification of Errors.

(2) Admiralty Rule No. 130 of the District Court in which the case was tried is as follows:

"Where proceedings in a decree shall not be stayed by an appeal, and the decree shall not be fulfilled or satisfied in ten days after notice to the proctor of the party against whom it shall be rendered it shall be of course to enter an order that the sureities of such party cause the engagement of their stipulation to be performed, or show cause in four days or on the first day of jurisdiction afterwards why execution should not issue against them, their lands, goods and chattels, according to their stipulation; and if no cause be then shown, due service having been made on the proctor of the party, a summary decree shall be rendered against them on their stipulations and execution issue; but the same may be discharged on the performance of the decree and payment of all costs."

(3) The record shows that, at the time the order was made upon the Stipulators, J. S. Goldsmith and F. M. Graham, to show cause why they should not perform the conditions of their stipulation, and the Supplemental Decree of February 19th was made against the Stipulators, the Claimant had perfected an appeal from the Final Decree of February 5th against him.

In addition to the stay of proceedings given under the above Rule of the District Court, before the entry of the Supplemental Decree the Supersedeas Bond of the Claimant on appeal in the sum fixed by the Court had been lodged with the Clerk and notice of application for its approval had been served upon the Proctors for Libellant and was approved by the Honorable District Judge at the same time he made the Supplemental Decree.

(4) We submit the record shows for the Stipulators good cause why they should not be required to perform the conditions of their stipulations, and the Honorable District Judge erred in making the Supplemental Decree of February 19th, and he had neither the right, the power nor the jurisdiction to make it. The case was then beyond his control, save only in the matters of perfecting the appeal and sending up the record.

(5) We candidly confess we did not know exactly where we stood after the entry of the Supplemental Decree of February 19th—there is no precedent for such action and none for relief from it. All proceedings were then stayed by the above Rule and, in addition, the Claimant had then perfected his appeal, yet we were confronted with another and subsequent decree purporting to modify the decree stayed by the above Rule from which an appeal had been perfected. Was the decree of February 5th against the Claimant the Final Decree, from which the appeal was properly taken? Did the appeal then taken and perfected cover the subsequent and Supplemental Decree? Or should an appeal be

taken from the two decrees after the entry of the last one? Under this complicated condition of affairs, to which we strenuously objected, we deemed the only safe course for the Claimant and his Stipulators to pursue was to perfect an appeal from the two decrees after the entry of the last, which was accordingly done; hence *the apparent double appeal shown by the record. The purpose was to bring the entire matter, beyond all question, up on appeal.* We insist now, as we did before the Honorable District Judge, that the decree of February 5th is the Final Decree, from which the appeal was properly taken and perfected by the Claimant, and that that appeal stayed all further proceedings in the District Court looking to the performance of the decree, which the Supplemental Decree certainly was in effect.

Respectfully submitted that the decree of the District Court should be reversed and the Libel dismissed.

METCALFE & JUREY and
ANDROS & FRANK,
Proctors and Appellants.

April 23rd, 1900.